

How Should EPA interpret the *Iowa League* decision?

Issue: How to interpret the court's decision with respect to EPA's authority to regulate "blending"?

Timing: Briefings for the AAs for Water and Enforcement will held in the next few days. OMB is very interested in the Agency's position, there is a high degree of interest by stakeholders and HQ is receiving requests from the Regions for guidance.

I. Background and context

a. *Iowa League v. EPA*, 711 F.3d 844 (8th Cir. 2013), rehearing denied (July, 2013). The Eighth Circuit concluded that it had jurisdiction to review two EPA letters sent in response to inquiries from a Senator regarding certain requirements under the Clean Water Act (CWA). The court determined that the letters promulgated two new rules regarding mixing zones and "blending." The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if EPA had followed APA procedures, EPA lacked statutory authority to promulgate the new "blending rule."

b. Bypass regulation. 40 C.F.R. § 122.41(m) -- a required provision of all NPDES permit -- prohibits bypass defined as "the intentional diversion of waste streams from any portion of a treatment facility" unless certain conditions are met, including that there are "no feasible alternatives" to the bypass.. EPA's letter explained when diversions from any portion of the treatment system at a POTW would constitute a bypass and thus be prohibited under the bypass regulation and subject to having to make a "no feasible alternatives demonstration." Here is the specific language from the letter that the court reviewed:

"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?"

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible

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alternatives" demonstration in the "bypass" provision at 40 CFR 122.4 1(m)(4). In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

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